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REPLY MEMORANDUM OF DEFENDANTS TOYOTA MOTOR SALES U.S.A., INC.,  
TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC., TOYOTA MOTOR ENGINEERING &  
MANUFACTURING NORTH AMERICA, INC. AND TOYOTA MOTOR CORPORATION  
IN SUPPORT OF PARTIAL MOTION TO DISMISS



1 physicians and consumers of the risk associated with taking  
2 Paxil during pregnancy. ***Although the allegations of fraud***  
3 ***involving omissions on the part of GSK are sufficiently***  
4 ***pled under Rule 9(b), they are preempted by the Ohio***  
5 ***Rev. Code § 2307.77 governing the failure to warn.***  
6

7 Stratford v. SmithKline Beecham Corp., 2008 U.S. Dist. LEXIS 84826, \*23 (S.D. Ohio  
8 June 17, 2008) (emphasis added) (copy attached as Exhibit A). In addition, contrary to  
9 plaintiffs' representation in their Memorandum, the only other case they cite on this  
10 issue, Glassner v. R. J. Reynolds Tobacco Co., 223 F.3d 343 (6th Cir. 2000), did **not**  
11 hold that a fraudulent concealment claim remains viable despite the OPLA. In fact, it  
12 did not address the issue of abrogation by the OPLA in any way and could not have.  
13 Glassner predated Ohio's passage of tort reform which amended the OPLA and  
14 confirmed that all common law product liability causes of action, including fraudulent  
15 concealment, are abrogated by the OPLA.  
16

17  
18 Plaintiffs also argue that by virtue of recalls they allege related to **design**  
19 **defects**, they have properly pled a manufacturing defect claim. This argument does not  
20 alter that the **only** allegations they make related to a purported manufacturing defect  
21 state the subject ES 350 "was defective in its [m]anufacture and construction" and the  
22 Toyota defendants failed to exercise ordinary care in the manufacture of its electronic  
23 throttle control system and other electronic components. Amended Complaint at ¶¶  
24 121(a), 122(a). These conclusory claims and unsupported inferences are not sufficient  
25 to overcome a motion to dismiss. See Bell Atlantic Corporation v. Twombly, 550 U.S.  
26

544, 555 (2007).

II. LAW AND ARGUMENT.

A. Plaintiffs' Fraudulent Concealment Claim Is Abrogated By The OPLA.

Plaintiffs have brought a common law fraudulent concealment product liability claim alleging the Toyota Defendants "concealed and suppressed" material facts related to purported product defects. Opposition Memorandum at 3-4, Case No. 8:11-CV-00761-JVS-FMO, Doc. #23, citing, Amended Complaint at ¶ 135, 139, 141 Case No. 8:11-CV-00761-JVS-FMO, Doc. #14. They expressly plead as part of said claim they suffered personal injuries as a "direct and proximate result of **defects** in the Lexus ES 350." Amended Complaint, ¶ 142 (emphasis added). Now, they argue in their Opposition Memorandum that the OPLA does not abrogate their common law fraudulent concealment product liability cause of action. Not only is their argument contradicted by the language of the OPLA and the express intent of the Ohio legislature, it also is directly contradicted by the holding of the primary case on which plaintiffs rely.

Initially, the OPLA **expressly** states it abrogates all common law product liability claims:

Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate **all** common law product liability claims or causes of action.

Ohio Rev. Code § 2307.71(B) (emphasis added). In enacting this provision in 2004, the Ohio legislature **expressly** confirmed its intent that the OPLA abrogates all common law claims:

1 The General Assembly declares its intent that the  
2 amendment made by this act to section 2307.71 of the  
3 Revised Code is intended to supersede the holding of the  
4 Ohio Supreme Court in Carrel v. Allied Products Corp.  
5 (1997), 78 Ohio St.3d 284, that the common law product  
6 liability cause of action of negligent design survives the  
7 enactment of the Ohio Product Liability Act, sections  
8 2307.71 to 2307.80 of the Revised Code, and **to abrogate**  
9 ***all common law product liability causes of action.***  
10

11 Ohio Rev. Code § 2307.71 at Legislative Findings and Intent (emphasis added)  
12 (attached as Exhibit B); see also Am. S.B. 80, § 3 (enacted 2004, effective April 7,  
13 2005) (excerpts attached as Exhibit C). The Ohio legislature reaffirmed its intent in  
14 2006:  
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16 The General Assembly declares its intent that the  
17 amendments made by this act to sections 2307.71 and  
18 2307.73 of the Revised Code are not intended to be  
19 substantive but are intended to clarify the General  
20 Assembly's original intent in enacting the Ohio Product  
21 Liability Act, sections 2307.71 to 2307.80 of the Revised  
22 Code, as initially expressed in Section 3 of Am. Sub. S.B. 80  
23 of the 125th General Assembly, **to abrogate all common**  
24 ***law product liability causes of action*** including common  
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1 law public nuisance causes of action, **regardless of how**  
2 **the claim is described, styled, captioned, characterized,**  
3 **or designated**, including claims against a manufacturer or  
4 supplier for a public nuisance allegedly caused by a  
5 manufacturer's or supplier's product.  
6

7 Ohio Rev. Code § 2307.71 at Legislative Findings and Intent (emphasis added); see  
8 also Am. S.B. 117, § 3 (enacted 2006, effective October 31, 2007) (excerpts attached  
9 as Exhibit D).

10 Consistent with the above, the primary case cited by plaintiff, Stratford v.  
11 SmithKline Beecham Corp., 2008 U.S. Dist. LEXIS 84826 (S.D. Ohio June 17, 2008),  
12 **expressly** holds that claims for fraudulent concealment have been abrogated by the  
13 OPLA:  
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15 The Plaintiffs' allegations of fraudulent omission are  
16 essentially allegations that GSK failed to properly warn  
17 physicians and consumers of the risk associated with taking  
18 Paxil during pregnancy. **Although the allegations of fraud**  
19 **involving omissions on the part of GSK are sufficiently**  
20 **pled under Rule 9(b), they are preempted by the Ohio**  
21 **Rev. Code § 2307.77 governing the failure to warn.**  
22

23 Stratford, 2008 U.S. Dist. LEXIS 84826 at \*23.  
24

25 Plaintiffs represented in their Opposition Memorandum that Glassner v. R. J.  
26 Reynolds Tobacco Co., 223 F.3d 343 (6th Cir. 2000) holds that fraudulent concealment  
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1 claims are not abrogated by the OPLA and remain viable. Opposition Memorandum at  
2 5, Case No. 8:11-CV-00761-JVS-FMO, Doc. #23. Glassner makes no such holding and  
3 did not analyze in any manner what claims are abrogated by the OPLA. See Glassner,  
4 223 F.3d generally. Nor could it. Glassner, which was decided in 2000, predated  
5 Ohio's passage of tort reform which expressly confirmed all common law product liability  
6 causes of action have been abrogated by the OPLA. See Ohio Rev. Code § 2307.71(B)  
7 and related Staff Notes.

9 Plaintiff did not attempt to distinguish or rebut the case law cited by the Toyota  
10 Defendants. That case law establishes all common law fraud claims arising out of a  
11 claimed product defect, not just claims alleging fraudulent concealment, have been  
12 abrogated by the OPLA. See Ohio Rev. Code § 2307.71(B); Crisp v. Stryker Corp.,  
13 2010 U.S. Dist. LEXIS 51390, at \*6, 10-11, 13 (N.D. Ohio May 21, 2010) (claims for  
14 fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, and  
15 fraud and deceit dismissed, without prejudice, because all are abrogated by the OPLA)  
16 (attached as Exhibit B to Motion to Dismiss); Deacon v. Apotex, Corp., 2008 U.S. Dist.  
17 LEXIS 113203, \*5, 8-9, 13 (S.D. Ohio July 3, 2008), adopted by Deacon v. Apotex,  
18 Corp., 2008 U.S. Dist. LEXIS 55584 (S.D. Ohio July 22, 2008) (claim for fraud  
19 dismissed, without prejudice, because it is abrogated by the OPLA) (attached as Exhibit  
20 C to Motion to Dismiss). Plaintiffs' claim for fraudulent concealment is abrogated by the  
21 OPLA and should be dismissed for failure to state a claim for which relief can be  
22 granted.  
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1 Redinger, 2010 U.S. Dist. LEXIS 49465, at \*1-2. Here, plaintiffs fail to state in any  
2 manner how the subject ES 350 deviated from design specifications, formula, or  
3 performance standards or to set forth a single fact in support of their manufacturing  
4 defect claim. See Amended Complaint generally, Case No. 8:11-CV-00761-JVS-FMO,  
5 Doc. #14. Courts have held that where a manufacturing defect claim contains no  
6 factual support, it should be dismissed. See Durkin v. Paccar, 2010 U.S. Dist. LEXIS  
7 110999 (D.N.J. Oct. 19, 2010) (holding the plaintiff's claim for manufacturing defect  
8 failed to state claim because the complaint contained no factual support for how the  
9 product deviated from the defendant's standard) (attached as Exhibit F); Gelber v.  
10 Stryker Corp., 752 F. Supp. 2d 328, 335 (S.D.N.Y. 2010) (dismissing a manufacturing  
11 defect claim because the plaintiffs failed to allege any facts surrounding the  
12 defectiveness of the product or how the product was manufactured improperly). As set  
13 forth in the Motion to Dismiss, plaintiffs' sole allegations related to a manufacturing  
14 defect state the subject ES 350 "was defective in its [m]anufacture and construction"  
15 and the Toyota defendants failed to exercise ordinary care in the manufacture of its  
16 electronic throttle control system and other electronic components. Id. at ¶¶ 121(a),  
17 122(a). Their allegations are nothing more than a "formulaic recitation of the elements"  
18 of an OPLA manufacturing defect claim, which "will not do." Bell Atlantic Corporation v.  
19 Twombly, 550 U.S. 544, 555 (2007). Plaintiffs' manufacturing defect claim should be  
20 dismissed.  
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25 **IV. CONCLUSION.**

26 Plaintiffs' common law claim for fraudulent concealment is abrogated by the  
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OPLA and plaintiffs' claim for defective manufacture does not state a plausible claim for relief. The claims should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

Dated: August 8, 2011

Respectfully submitted,

/s/Timothy R. Bricker

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